

Docket No. 1,001,126

The ALJ awarded claimant a 10 percent functional impairment to the body as a whole for his ongoing complaints stemming from his herniated disk and subsequent surgery. The ALJ concluded claimant's injury and subsequent herniation was attributable

to a series of accidents claimant says culminated on November 12, 2001, while in respondent's employ.

The respondent requests review of this Award contending the ALJ erred in various respects. From the inception of this claim and throughout two preliminary hearings, respondent stridently denied that claimant sustained any compensable injury. Respondent concedes claimant sought treatment on three occasions from his own chiropractor for low back complaints immediately after his alleged accident. However, respondent points out claimant had no further treatment scheduled and had returned to rather strenuous work without any restrictions, only to be fired on November 26, 2001 for excessive absences.

Respondent maintains the claimant's herniated disk, which was diagnosed on October 1, 2002, over 10 months after claimant last worked for respondent, is attributable to an intervening accident that occurred on April 4, 2002. Thus, respondent adamantly maintains it has no responsibility for the temporary benefits awarded by the ALJ, nor is it liable for the permanency associated with that surgery.<sup>1</sup> Therefore, respondent contends the ALJ's Award should be reversed.

Claimant argues the ALJ was correct in ordering both temporary and permanent benefits for his low back injury. He asserts his daily work duties of moving, loading and lifting heavy batteries aggravated his underlying degenerative spine disease. Claimant offers the testimony of Dr. William Bailey who indicates claimant's herniated disk was the natural and probable consequence of his original work injury and not the subsequent April 2002 lifting event. Accordingly, claimant requests the Board affirm the ALJ's Award.

The issues to be decided by the Board are as follows:

- 1) whether claimant suffered personal injury by accident on November 12, 2001;
- 2) whether claimant's low back injury arose out of and in the course of his employment with respondent;
- 3) whether claimant provided timely notice to respondent as required by K.S.A. 44-520; and
- 4) the nature and extent of claimant's functional impairment.

---

<sup>1</sup> At oral argument claimant's counsel conceded this case involves only a functional impairment as claimant has returned to a comparable wage. See K.S.A. 44-510e(a).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

In September 2001, claimant began his employment with respondent as a battery technician. His job required him to install and remove batteries from trucks, along with moving the batteries around the facility as needed. According to claimant the batteries weighed 50 up to 120 pounds. Ron Zeller, respondent's owner, testified most batteries weigh no more than 40 pounds, and those that weigh more are stored lower to the ground making them easier to move.

Claimant alleges he injured his back as a result of repetitive work activities which culminated on or about November 12, 2001. Claimant indicated during his deposition testimony, that he began to notice low back pain in approximately October 2001. Then, on November 13, 2001, he awoke and found that he could not get out of bed because both of his legs were numb. He also complained of stabbing pain in his low back. According to claimant, his friend, Mary Lisa Rinke, notified his employer on that date that he had hurt his back and would not be in to work that day.

Claimant sought treatment from Dr. Dennis L. Anthony, a chiropractor, the next day, November 14, 2001. Dr. Anthony's medical record of November 14, 2001 indicates claimant alleged he injured his back at work. Claimant saw Dr. Anthony two more times that month and no further treatment was contemplated. On November 26, 2001, claimant returned to work. He went to talk to Ron Zeller, respondent's owner, and was told something to the effect that "if you have back problems, you don't need to be working here."<sup>2</sup> Claimant was then fired. According to Ron Zeller, he fired claimant for failing to show up for work or call in to explain his absences. He denies that claimant told him of a work-related injury before November 26, 2001.

In December 2001, claimant obtained employment with another company as a telemarketer. The parties agree claimant's wage with this company presently exceeds 90 percent of what he was earning while working for respondent. This job is less strenuous and allows claimant to stand and sit while providing assistance to customers on the telephone.

On April 4, 2002, claimant was at home and lifted an empty Styrofoam cooler. He immediately experienced upper back pain complaints for which he sought treatment, again with Dr. Anthony. The medical records of Dr. Anthony indicate treatment was provided to

---

<sup>2</sup> P.H. Trans. (May 7, 2002) at 11.

claimant's low back, although the pain diagram certainly implicates the thoracic area and not just the lower or upper portions of claimant's back.

Dr. Anthony went on to treat claimant 17 times over the course of the next year, the last treatment occurring on April 21, 2003. Claimant specifically requested Dr. Anthony's office maintain separate files on the treatment he received after April 4, 2002. It appears from the record that this was done because claimant was paying for this treatment on his own.

Claimant also saw his primary care physician, John P. Gravino, on April 8, 2002. Those records reflect claimant's complaint that he lifted a cooler on April 4, 2002 and sustained a lower back injury.

When medical benefits were not forthcoming, claimant filed a claim and sought preliminary relief. Following a hearing, the ALJ entered an order specifically finding that claimant sustained an accidental injury, arising out of and in the course of his employment and timely notice. The ALJ concluded "[n]otice was given on November 26, 2001. Not counting weekends, notice [was] provided on the 10<sup>th</sup> day following [the] accident."<sup>3</sup> That Order was appealed to the Board and affirmed on July 25, 2002. Accordingly, respondent was ordered to provide treatment with Dr. Wertzberger.

Claimant's treatment was directed to Dr. Bailey<sup>4</sup>, an associate of Dr. Wertzberger. Dr. Bailey first saw claimant on June 13, 2002. He noted no neurological abnormalities or weaknesses but scheduled a MRI. The MRI revealed degenerative disk disease with disk bulging at L3-4 and L4-5. He testified that this finding was consistent with claimant's complaints of radiating pain in the right leg and low back. He diagnosed lumbar radiculitis and recommended a series of epidural blocks and physical therapy.

Claimant's treatment continued until October 1, 2002, when he complained the physical therapy was not helping his symptoms. At this point, claimant was also demonstrating positive straight leg responses. A second MRI was ordered and showed a right lateral disk herniation at L4-5. Dr. Bailey recommended a partial laminectomy to remove the loose fragments of disk that were causing the nerve to compress. Surgery was done on October 14, 2002.

Claimant was eventually released by Dr. Bailey in May of 2003, although he did refer claimant to Dr. R. Lance Snyder for a second opinion. Dr. Snyder saw claimant on one occasion, September 23, 2003, and confirmed Dr. Bailey's suspicion that claimant was at

---

<sup>3</sup> ALJ Order for Medical Treatment (May 10, 2002) at 1.

<sup>4</sup> An amended order was entered on May 29, 2002, ordering respondent to provide treatment with Dr. Bailey.

maximum medical improvement. Thereafter, on October 16, 2003, Dr. Bailey assigned a 10 percent permanent partial impairment to the whole body based upon the 4<sup>th</sup> edition of the *Guides*.<sup>5</sup>

When asked, Dr. Bailey testified that the bulge identified in June 2002 and subsequent herniation was a natural and probable result of the November 12, 2001 accident.<sup>6</sup> Dr. Bailey rejected the assertion that the lifting of the Styrofoam cooler on April 4, 2002 was an intervening accident. He conceded that it was possible that event caused the claimant's bulging disk and later the herniation, but he would go no further.<sup>7</sup> Dr. Bailey continued to assert that the event of November 12, 2001 was the source of claimant's physical complaints.

In contrast to this testimony are the opinions of Dr. Philip Baker, an orthopaedic surgeon who saw claimant for a single evaluation. Dr. Baker saw claimant on April 22, 2003 and diagnosed degenerative spine disease with a post clinical history of radiculopathy with spine surgery. Dr. Baker opined that claimant's herniated disk was not due to his work for respondent for the simple reason that the onset of a herniated disk should follow fairly close in time to the precipitating event. Here, claimant last worked for respondent on November 12, 2001, and his herniation was not identified until October 2002. Dr. Baker did however, assign a total of 10 percent functional impairment under the *Guides*. Dr. Baker explained that 5 percent of this preexisted the first MRI and the remaining 5 percent is due to claimant's radicular complaints. So, at best, he concluded claimant sustained a 5 percent impairment due to the November 5, 2001 accident.

Whether claimant sustained "personal injury by accident" has been repeatedly considered by both the ALJ and the Board. Admittedly, the present factual scenario presents a close call. The onset of claimant's physical complaints were immediate in November 2001 and yet after three chiropractic visits, he was ready to return to work and had no further treatment scheduled nor recommended to him. After his termination from respondent's employ, he sought out other employment. At no time before April 4, 2002 did claimant request treatment from respondent even though his E-1 and an E-3 had been filed with the Division.<sup>8</sup> Only after a period of over four months and immediately after a lifting incident did claimant seek out treatment, on his own with a chiropractor, his primary care physician and through the workers compensation system.

---

<sup>5</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

<sup>6</sup> Bailey Depo. (Jan. 5, 2004) at 40.

<sup>7</sup> *Id.* at 23-24.

<sup>8</sup> The filing date for the E-1 was December 12, 2001 and the E-3 April 4, 2002.

K.S.A. 2002 Supp. 44-508(e) defines “personal injury” and “injury”:

“Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 2002 Supp. 44-508(d) defines “accident”:

“Accident” means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

Given this framework, the Board finds that claimant sustained a personal injury by accident while working for respondent on November 12, 2001. The nature of claimant’s work required him to repetitively lift heavy batteries. While claimant initially pinpointed the onset of his symptoms to be October 2001, he very clearly had an event on November 12, 2001, which caused him significant and acute physical symptoms which he discovered on the morning of November 13, 2001. Under these facts and claimant’s testimony, the Board concurs with the ALJ’s finding on this issue.

Respondent also argues that claimant’s injury did not “arise out of and in the course of” his employment. The medical testimony from Dr. Bailey is, in the Board’s view, persuasive on this issue. Dr. Bailey was the treating physician and had the unique opportunity to examine claimant and evaluate his complaints. He concluded the bulging and later herniated disk was the natural and probable result of claimant’s work-related injury. Although Dr. Baker disagrees with this analysis, reasonable minds can disagree. The ALJ was persuaded by the testimony of Dr. Bailey and the Board will not disturb that finding in this instance.

Likewise, the ALJ’s finding on timely notice should be affirmed. Respondent contends the ALJ “contrived” evidence and improperly posed questions to claimant during the hearing, thus tailoring the claimant’s testimony to accommodate the ALJ’s conclusions with respect to the date of claimant’s accidental injury and the timeliness of notice. The Board disagrees. After reviewing the transcript, it is clear the ALJ, in asking questions of the claimant, was merely clarifying his understanding of the claimant’s testimony, an act which the ALJ has the discretion to do. In any event, the evidence is clear that claimant’s last day of work was November 12, 2001. Claimant says a friend notified his employer of his back problems on November 14, 2001, the day he sought treatment from Dr. Anthony,

and even if that weren't accepted, Ron Zeller admits he learned on November 26, 2001, of claimant's work-related injury. November 26, 2001 falls on the 10<sup>th</sup> day after November 12, 2001, when the intervening weekends and holidays are excluded. Thus, the ALJ's finding of timely notice is affirmed.

As for the nature and extent of claimant's impairment, the Board affirms the ALJ's assessment of 10 percent based upon the testimony of Dr. Bailey. He was the treating physician and although that fact alone is not dispositive, his testimony is certainly persuasive in this instance. Accordingly, the ALJ's award of 10 percent functional impairment to the body as a whole is affirmed.

Respondent's oral argument and brief suggest that claimant was overpaid temporary total disability.<sup>9</sup> Simply put, claimant was released by Dr. Bailey in May 2003 without any written indication that he was at maximum medical improvement (MMI), although Dr. Bailey later testified claimant was, in fact, at MMI. Thereafter, when Dr. Snyder saw him he concluded claimant was at MMI and a report was issued in October 2003. Respondent believes it should not be responsible for temporary total disability benefits from the date Dr. Bailey released him.

While Dr. Bailey may have testified that claimant was at MMI as of May 2003, that fact was not disclosed to either claimant or respondent in any sort of report. Moreover, claimant was referred to Dr. Snyder who, only then, released him to return to work as of October 7, 2003. Accordingly, the Board finds temporary total disability benefits are owed until October 7, 2003. To the extent any benefits were paid past that date, respondent is entitled to a credit against the permanency.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated March 4, 2004, is affirmed.

---

<sup>9</sup> Respondent's counsel is strongly urged to file a submission brief and disclose any and all arguments to the ALJ and opposing party. Here, the respondent offered no written brief to the ALJ, thus leaving him to surmise about respondent's legal position on the issues. Now respondent is making a rather technical and fact specific argument stemming from the alleged overpayment of temporary total disability benefits without providing any sort of authenticated documentation. Not only does this practice lend itself to error, it places claimant in a precarious position in terms of preparation.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2004.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Neil A. Dean, Attorney for Claimant  
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director